



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Bay Tankers, Inc.--Request for Reconsideration

File: B-227965.5

Date: April 5, 1988

DIGEST

Request for reconsideration is denied where there is no showing that prior decision may have been based on factual or legal errors.

DECISION

Bay Tankers, Inc. requests reconsideration of our decision in Bay Tankers, Inc., B-227965.3, Nov. 23, 1987, 87-2 CPD ¶ 500, wherein we denied Bay Tankers' protest of the cost comparison conducted by the Military Sealift Command (MSC) under request for proposals No. N00033-86-R-4004. MSC determined pursuant to Office of Management and Budget (OMB) Circular A-76 that MSC can operate and maintain two hospital ships at a lower cost than Bay Tankers. We deny the request for reconsideration.

In its administrative appeal of the agency's determination and in its subsequent protest to our Office, Bay Tankers alleged that MSC had underestimated the cost of in-house performance in several respects. In denying the protest, we rejected Bay Tankers' contention that the government's estimate of in-house performance costs improperly failed to include a factor for inevitable instances of defective performance by in-house personnel; the solicitation provided for payment deductions to be made in the event of defective performance by the contractor. Bay Tankers maintained that it is virtually certain that some deductions will be made; that good business practice therefore required offerors to include in their proposed costs a reserve for payment deductions; and that, based upon the rate of defective performance by commercial contractors operating and maintaining other ships for MSC, \$118,356 should be added to the in-house cost estimate to retain "parity of bidding" between MSC and commercial offerors and to reflect the cost to the government when the hospital ships are not properly maintained and operated.

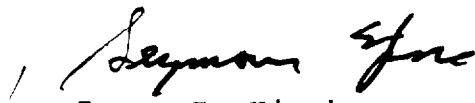
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We recognized in our decision, however, that while the government and commercial offerors must compete on the basis of the same performance work statement, they are subject to different legal obligations regarding performance that may cause the commercial concerns to suffer a cost disadvantage, as here, where the contractor is subject to payment deductions for defective performance while the government is not. In our view, including a price factor in a cost proposal to offset potential payment deductions in the event of defective performance is something a commercial offeror elects to do at its own risk as a matter of business judgment. There is no requirement under OMB Circular A-76 cost comparison procedures that the agency add a similar factor to the in-house estimate to equalize disparities inherent in the different positions of the government and commercial offerors. See generally SMC Information Systems, B-225815, June 1, 1987, 87-1 CPD ¶ 552; Samsel Services Co., B-213828, Sept. 5, 1984, 84-2 CPD ¶ 257.

In its request for reconsideration, Bay Tankers argues that our conclusion did not take into consideration the provisions of the Department of Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, 100 Stat. 3816, 3977, requiring the Secretary of Defense to ensure in cost comparisons that "all costs considered, including the costs of quality assurance . . . are realistic and fair." Bay Tankers states that the agency advised prospective offerors at the preproposal conference that it would comply with the requirements of the Act.

We will not reconsider our original decision based on this argument. Our Bid Protest Regulations do not contemplate the unwarranted piecemeal presentation of protest arguments; accordingly, we are not inclined to review on reconsideration a new argument that could and should have been raised in the initial protest to our Office. See 4 C.F.R. § 21.2(a) (1987); Adrian Supply Co.--Reconsideration, B-225630.3, Aug. 7, 1987, 87-2 CPD 136. In any case, our initial review of this issue--even though not specifically conducted under the terms of the act--turned up nothing that would lead us to conclude that the cost comparison was inconsistent with the act.

Since Bay Tankers has not presented any evidence of factual or legal errors in our prior decision, its request for reconsideration is denied.


James F. Hinchman
General Counsel